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7 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON8 FELICIA A. GUTIERREZ,)
9 Plaintiff,) No. CV-06-3092-CI
10 v.) ORDER GRANTING PLAINTIFF'S
11 MICHAEL J. ASTRUE) MOTION FOR SUMMARY JUDGMENT
12 Commissioner of Social) AND REMANDING FOR ADDITIONAL
Security,) PROCEEDINGS PURSUANT TO
13 Defendant.) SENTENCE FOUR 42 U.S.C.
14) § 405(g)
-----15 BEFORE THE COURT are cross-Motions for Summary Judgment (Ct.
16 Rec. 27, 30.) Attorney D. James Tree represents Plaintiff; Special
17 Assistant United States Attorney Richard Rodriguez represents
18 Defendant. The parties have consented to proceed before a
19 magistrate judge. (Ct. Rec. 8.) After reviewing the administrative
20 record and briefs filed by the parties, the court **GRANTS** Plaintiff's
21 Motion for Summary Judgment, and remands the matter to the
22 Commissioner for additional proceedings.23 **JURISDICTION AND PROCEDURAL HISTORY**24 On January 24, 2003, plaintiff Felicia Gutierrez (Plaintiff)
25 protectively filed an application for Social Security Income
26 benefits. (Tr. 57.) She alleged disability due to osteoarthritis of
27 the spine, liver disorder, and back pain, with an onset date of
28ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND REMANDING FOR ADDITIONAL PROCEEDINGS
PURSUANT TO SENTENCE FOUR 42 U.S.C. § 405(g) - 1

1 November 2002. (Tr. 66.) Benefits were denied initially and on
2 reconsideration. (Tr. 27.) Plaintiff requested a hearing before
3 an administrative law judge (ALJ), which was held before ALJ Mary
4 Bennett Reed on May 23, 2005. (Tr. 279-305.) In her request for
5 hearing, Plaintiff added impairments due to depression, anxiety and
6 obesity. (Tr. 101.) Plaintiff, who was represented by counsel,
7 testified. Vocational expert Diane Kramer, appeared and was
8 examined by Plaintiff's attorney. (Tr. 303-04.) The ALJ denied
9 benefits and the Appeals Council denied review. (Tr. 5-7.) The
10 instant matter is before this court pursuant to 42 U.S.C. § 405(g).

11 **STATEMENT OF THE CASE**

12 The facts of the case are set forth in detail in the transcript
13 of proceedings, and are briefly summarized here. At the time of the
14 hearing, Plaintiff was 34 years old. She testified she was five
15 feet seven inches in height and weighed two hundred and fifty or
16 sixty pounds. (Tr. 283.) She had a ninth-grade education and was
17 divorced. (Tr. 72, 257.) She had seven children at the time of the
18 hearing; a three-year old, five-year old and eight-month old twins
19 lived with her at home. (Tr. 72, 293.) She testified she worked
20 briefly at the YWCA but could not sustain the work due to pain,
21 problems with co-workers and the work environment. (Tr. 284-85.)
22 She testified she could not work due to pain, fatigue, and mental
23 health issues.

24 **ADMINISTRATIVE DECISION**

25 At step one, ALJ Reed found Plaintiff had not engaged in
26 substantial gainful activity during the relevant time. (Tr. 23.)
27 At steps two and three, she found Plaintiff had severe impairments,
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1 but they did not meet or equal one of the listed impairments in
 2 Appendix 1, Subpart P, Regulation No. 4 (Listings). (Tr. 23.)
 3 Specifically, the ALJ found Plaintiff had the severe physical
 4 impairments of degenerative disc disease, obesity, and liver
 5 disease, but did not have a severe mental impairment. (Tr. 20.)
 6 She found Plaintiff's subjective complaints regarding her functional
 7 limitations were "not fully credible." (Tr. 21-22.) At step four,
 8 the ALJ found Plaintiff had no past relevant work but retained the
 9 residual functional capacity (RFC) for a full range of light work.
 10 (Tr. 24.) At step five, referencing Medical-Vocational Rule 202.17,
 11 the ALJ found Plaintiff was not under a "disability" as defined by
 12 the Social Security Act through the date of her decision. (Id.)

13 **STANDARD OF REVIEW**

14 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 15 court set out the standard of review:

16 A district court's order upholding the Commissioner's
 17 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
 18 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
 19 Commissioner may be reversed only if it is not supported
 20 by substantial evidence or if it is based on legal error.
Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999).
 21 Substantial evidence is defined as being more than a mere
 22 scintilla, but less than a preponderance. *Id.* at 1098.
 23 Put another way, substantial evidence is such relevant
 24 evidence as a reasonable mind might accept as adequate to
 25 support a conclusion. *Richardson v. Perales*, 402 U.S.
 26 389, 401 (1971). If the evidence is susceptible to more
 27 than one rational interpretation, the court may not
 28 substitute its judgment for that of the Commissioner.
Tackett, 180 F.3d at 1097; *Morgan v. Commissioner*, 169
 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility,
 25 resolving conflicts in medical testimony, and resolving
 26 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 27 Cir. 1995). The ALJ's determinations of law are reviewed
 28 *de novo*, although deference is owed to a reasonable
 construction of the applicable statutes. *McNatt v. Apfel*,

1 201 F.3d 1084, 1087 (9th Cir. 2000).

2 **SEQUENTIAL PROCESS**

3 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
 4 requirements necessary to establish disability:

5 Under the Social Security Act, individuals who are
 6 "under a disability" are eligible to receive benefits. 42
 7 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
 8 medically determinable physical or mental impairment"
 9 which prevents one from engaging "in any substantial
 10 gainful activity" and is expected to result in death or
 11 last "for a continuous period of not less than 12 months."
 12 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
 13 from "anatomical, physiological, or psychological
 14 abnormalities which are demonstrable by medically
 acceptable clinical and laboratory diagnostic techniques."
 15 42 U.S.C. § 423(d)(3). The Act also provides that a
 16 claimant will be eligible for benefits only if his
 17 impairments "are of such severity that he is not only
 18 unable to do his previous work but cannot, considering his
 19 age, education and work experience, engage in any other
 20 kind of substantial gainful work which exists in the
 21 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
 the definition of disability consists of both medical and
 vocational components.

22 In evaluating whether a claimant suffers from a
 23 disability, an ALJ must apply a five-step sequential
 24 inquiry addressing both components of the definition,
 25 until a question is answered affirmatively or negatively
 in such a way that an ultimate determination can be made.
 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
 19 claimant bears the burden of proving that [s]he is
 20 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
 21 1999). This requires the presentation of "complete and
 detailed objective medical reports of h[is] condition from
 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
 404.1512(a)-(b), 404.1513(d)).

22 It is the role of the trier of fact, not this court, to resolve
 23 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
 24 supports more than one rational interpretation, the court may not
 25 substitute its judgment for that of the Commissioner. *Tackett*, 180
 26 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
 27 Nevertheless, a decision supported by substantial evidence will
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1 still be set aside if the proper legal standards were not applied in
 2 weighing the evidence and making the decision. *Brawner v. Secretary*
 3 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
 4 there is substantial evidence to support the administrative
 5 findings, or if there is conflicting evidence that will support a
 6 finding of either disability or non-disability, the finding of the
 7 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
 8 1230 (9th Cir. 1987).

9 ISSUES

10 The question is whether the ALJ's decision is supported by
 11 substantial evidence and free of legal error. Specifically,
 12 Plaintiff argues the ALJ erred at step two when she found no severe
 13 mental impairment, and at step five when she failed to identify
 14 specific jobs Plaintiff could perform in light of her specific
 15 functional limitations. (Ct. Rec. 28 at 11.)

16 DISCUSSION

17 A. Step Two: Mental Impairments

18 To satisfy step two's requirement of a severe impairment, the
 19 Plaintiff must provide medical evidence consisting of signs,
 20 symptoms, and laboratory findings; the claimant's own statement of
 21 symptoms alone will not suffice. 20 C.F.R. § 416.908. The effects
 22 of all symptoms must be evaluated on the basis of a medically
 23 determinable impairment which can be shown to be the cause of the
 24 symptoms. 20 C.F.R. § 416.929. The Commissioner has passed
 25 regulations which guide dismissal of claims at step two. Those
 26 regulations state an impairment may be found to be not severe only
 27 when evidence establishes a "slight abnormality" on an individual's
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1 ability to work. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988)
 2 (citing *Social Security Ruling (SSR)* 85-28). The ALJ must consider
 3 the combined effect of all of the claimant's impairments on the
 4 ability to function, without regard to whether each alone was
 5 sufficiently severe. See 42 U.S.C. § 423(d)(2)(B) (Supp. III 1991).
 6 The step two inquiry is a *de minimis* screening device to dispose of
 7 groundless or frivolous claims. *Bowen v. Yuckert*, 482 U.S. 137,
 8 153-154.

9 Here, although the ALJ found Plaintiff had been treated with
 10 medication and counseling for depression and anxiety, she found no
 11 severe mental impairment. (Tr. 20.) She reasoned as follows:

12 However, review of records indicate [sic] no ongoing
 13 problems with depression or anxiety at Exhibit 9F, indeed
 14 there is only one mention in that Exhibit . . . in April
 15 2003. Exhibit 8F refers only to depression as a teenager.
 16 Exhibit 11F indicates no mention of depression until
 17 October 2003 . . . when she appeared alert, oriented and
 18 not distressed. The claimant has not alleged disability
 19 based on depression or anxiety, only mentioning her back
 20 and liver as a problem. In the consultative psychological
 examination . . . , no diagnosis could be made based on
 malingered test results. Dr. Toews stated he assessed a
 moderate limitation in the ability to interact
 appropriately with the public based on motivational
 factors, and not on any medically determinable mental
 impairment. As the claimant stated she would not go back
 for an additional evaluation, based on the current
 evidence of record, the undersigned finds she does not
 have a severe mental impairment.

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22 (Tr. 20.)

23 The record shows that the ALJ's findings of "no ongoing
 24 problems with depression and anxiety" is not supported by
 25 substantial evidence. In June 2002, and in other places in the
 26 record, Plaintiff complained of fatigue; her treating sources
 27 assessed "chronic fatigue," and noted a history of depression and

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1 anxiety. (Tr. 108, 128.) In June 2003, Plaintiff reported
2 increased problems with depression in her reconsideration report,
3 and in her request for an ALJ hearing. (Tr. 96, 101.) Medical
4 records reflect she was prescribed anti-depressants as treatment for
5 depression by her treating physicians at Central Washington Family
6 Medicine. She was also assessed with anxiety.¹ Low back pain was
7 attributed to her obesity. (Tr. 149, 150, 174, 176.)

8 Mental health progress notes from Central Washington
9 Comprehensive Mental Health consistently report Plaintiff's
10 depressed and anxious mood and treatment with antidepressants. (Tr.
11 205, 207, 209, 226, 236.) Plaintiff's complaints are consistent
12 with the medical record in its entirety, which shows intermittent
13 diagnoses of depression, anxiety, post-traumatic stress disorder,
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15 ¹ In her credibility findings, the ALJ discounted Plaintiff's
16 allegations of mental problems due, in part, to Plaintiff's
17 statement that she was too busy to take the medications. (Tr. 21.)
18 However, the Ninth Circuit cautions against chastising one with a
19 mental impairment for the exercise of poor judgment in seeking
20 rehabilitation. *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir.
21 1996). Further, medical records indicate Plaintiff did not take the
22 medication for fear of an adverse reaction and concerns for the
23 safety of her unborn child. Plaintiff explained she had suffered an
24 adverse reaction from another drug at the same time she was
25 prescribed anti-depressants. (Tr. 149-50, 208.) These are good
26 reasons for not following a treatment recommendation and, therefore,
27 should not impugn Plaintiff's credibility. SSR 96-7p.
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1 chronic pain, and fatigue. There is no indication that Plaintiff's
 2 treating medical sources dismissed Plaintiff's complaints as
 3 unfounded or refused to treat her reported symptoms. Thus, there is
 4 not the total absence of objective medical evidence necessary to
 5 preclude a step two finding of "severe" mental impairment. *Webb v.*
 6 *Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005). Finally, the ALJ found
 7 Plaintiff had the severe impairment of obesity, an impairment that
 8 may cause or contribute to depression. *SSR 02-1p*, Policy
 9 Interpretation ¶2.

10 Although Plaintiff may not succeed in proving she is disabled,
 11 as defined by the Social Security Act, the ALJ lacked substantial
 12 evidence to find no medically severe mental impairment. The ALJ
 13 should continue the sequential evaluation beyond step two to include
 14 limitations caused by Plaintiff's severe physical and psychological
 15 impairments (alone and in combination), pain and fatigue, as
 16 directed by the Regulations. 20 C.F.R. §§ 416.920, .920a, .929; *SSR*
 17 02-1p.

18 **B. Residual Functional Capacity - Obesity**

19 Plaintiff contends the ALJ did not consider the impact of her
 20 obesity in combinations with her other impairments. (Ct. Rec. 28 at
 21 17.) While obesity has been eliminated as a Listing, it can
 22 constitute the equivalence of a Listing. Social Security Ruling 02-
 23 01p addresses the significance of obesity in the sequential
 24 evaluation process. Prefaces to the musculoskeletal, respiratory
 25 and cardiovascular body system Listings provide guidance about the
 26 potential effects obesity has in causing or contributing to
 27 impairments in those body systems. See, e.g., 20 C.F.R. § 404,
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1 Subpt. P, App. 1, 1.00Q. The Commissioner recognizes that obesity
 2 will constitute a severe impairment when "it significantly limits an
 3 individual's physical or mental ability to do basic work
 4 activities." *SSR* 02-01p.

5 Additionally, obesity must be considered at step four of the
 6 process because it can cause limitation of function. An assessment
 7 should be made of the effect obesity has upon the individual's
 8 ability to perform routine movement and necessary physical activity
 9 within the work environment. *Id.* Weight gain alone does not
 10 evidence impaired functionality; that is why *SSR* 00-3p and 02-1p
 11 direct an ALJ to evaluate the effect of a claimant's obesity with
 12 reference to a listed impairment and not to make assumptions about
 13 the severity or functional effects of obesity. *SSR* 02-1p at ¶1 &
 14 ¶6; *SSR* 00-3p at ¶6. The Listing for musculoskeletal impairment
 15 specifically notes the potential impact of obesity on that
 16 condition. 20 C.F.R. § 404, Subpt P, App. 1, Listing 1.00(Q).²

17 Here, at step 2 the ALJ found Plaintiff's obesity was a severe
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19 ² The revised listing added the following paragraph:

20 Effects of obesity. Obesity is a medically determinable
 21 impairment that is often associated with disturbance of
 22 the musculoskeletal system, and disturbance of this system
 23 can be a major cause of disability in individuals with
 24 obesity. The combined effects of obesity with
 25 musculoskeletal impairments can be greater than the
 26 effects of each of the impairments considered separately.
 27 Therefore, when determining whether an individual with
 28 obesity has a listing-level impairment or combination of
 29 impairments, and when assessing a claim at other steps of
 30 the sequential evaluation process, including when
 31 assessing an individual's residual functional capacity,
 32 adjudicators must consider any additional and cumulative
 33 effects of obesity.

20 C.F.R. Pt. 404, Subpt P, App. 1, Listing 1.00Q.

1 impairment. However, the step four analysis did not adequately
2 address obesity and its combined effect with Plaintiff's
3 musculoskeletal impairments and depression. The ALJ simply found
4 "Plaintiff is obese." (Tr. 22.) Because obesity can cause
5 limitation of function, the combined effects of obesity with
6 Plaintiff's osteoarthritis, back pain, fatigue and depression
7 symptoms may be greater than expected without obesity. SSR 02-1p.
8 A failure to consider the cumulative limitations caused obesity is
9 reversible error. See *Celaya v. Halter*, 332 F.3d 1177, 1182 (9th
10 Cir. 2003); SSR 96-8p (ALJ must consider all limitations imposed by
11 claimant's impairments, severe and non-severe, in assessing RFC).
12 If, on remand, the ALJ determines there is insufficient evidence to
13 determine the cumulative effect of Plaintiff's obesity and other
14 impairments on her ability to work on a sustained basis, the record
15 must be developed further, and if necessary, expert testimony must
16 be taken. See e.g. *Clifford v. Apfel*, 227 F.3d 863, 873 (7th Cir.
17 2000).

18 **C. Step Five - Use of the Medical-Vocational Guidelines**

19 At step five, the burden shifts to the Commissioner to show
20 that (1) the claimant can perform other substantial gainful
21 activity; and (2) a "significant number of jobs exist in the
22 national economy" which claimant can perform. *Kail v. Heckler*, 722
23 F.2d 1496, 1498 (9th Cir. 1984). The Medical-Vocational Guidelines
24 (Grids) is a matrix system developed by the Commissioner for
25 resolving cases that involve substantially uniform functional
26 capacities. *Desrosiers v. Secretary of Health and Human Services*,
27 846 F.2d 573, 578 (9th Cir. 1988). The Grids were adopted to improve
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1 the efficiency of disability benefits proceedings. *Id.* Their use
 2 was upheld as valid in *Heckler v. Campbell*, 461 U.S. 458 (1983).
 3 However, the Grids are an administrative tool, and there are strict
 4 limits on when the Commissioner may rely on them; the exclusive use
 5 of the Grids is proper only where "a claimant's functional
 6 limitations fall into a standardized pattern accurately and
 7 completely described by the Grids." *Tackett*, 180 F.3d at 1103
 8 (citing *Desrosiers*, 846 F.2d at 577). Where the Grids do not
 9 accurately describe a claimant's condition, the Grids are used as a
 10 "framework for decision-making," and vocational expert testimony is
 11 required to determine if there are jobs in the national economy that
 12 the individual claimant can perform. See *Polny v. Bowen*, 864 F.2d
 13 661, 663-64 (9th Cir. 1988); *SSR* 83-12. Where the Grids are not
 14 determinative, the Commissioner has the burden of showing specific
 15 jobs within the claimant's capabilities. See *Kail*, 722 F.2d at 1498.
 16 Further, a claimant's particular limitations, including pain,
 17 fatigue, and in the case of Plaintiff, obesity, and their impact on
 18 the full range of light work must be evaluated individually. *SSR*
 19 83-12.

20 The ALJ applied the Grids in her determination that Plaintiff
 21 was not disabled. (Tr. 23.) However, the Grids do not adequately
 22 describe the limitations caused by non-exertional mental impairments
 23 (severe and non-severe), pain, fatigue and obesity; therefore, their
 24 use was not appropriate. *Tackett*, 180 F.3d at 1103. In evaluating
 25 obesity and its impact on RFC, an ALJ must consider claimant's
 26 ability "to do sustained work activities in an ordinary work setting
 27 on a regular and continuing basis." *SSR* 02-01p. Without reliable
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1 evidence that a claimant can perform a specific job, the ALJ must
2 use a vocational expert to meet the Commissioner's step five burden.
3 *Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir. 1993). On remand,
4 the ALJ will obtain vocational expert testimony on the impact of
5 obesity and other non-exertional limitations on Plaintiff's ability
6 to perform work-related activities on a sustained basis in a work
7 setting. *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005).
8 Accordingly,

9 **IT IS ORDERED:**

10 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 27**) is
11 **GRANTED**. This matter is remanded to the Commissioner for additional
12 proceedings pursuant to sentence four of 42 U.S.C. § 405(g) and
13 consistent with the decision above;

14 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 30**) is
15 **DENIED**;

16 3. An application for attorney fees may be filed by separate
17 motion.

18 The District Court Executive is directed to file this Order and
19 provide a copy to counsel for Plaintiff and Defendant. Judgment
20 shall be entered for Plaintiff and the file shall be **CLOSED**.

21 DATED October 23, 2007.

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S/ CYNTHIA IMBROGNO
24 UNITED STATES MAGISTRATE JUDGE
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